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IN THE

Supreme Court of the United States

JOHN H. ARTHUR, *Petitioner,*

v.

STANDARD ENGINEERING COMPANY, a corporation,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, John H. Arthur, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Record ~~86-89~~ 75-83) has been reported in 193 F. 2d 903.

Jurisdiction.

The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit were rendered

on October 25, 1951; petition for rehearing was seasonably filed by petitioner on November 9, 1951, and was denied on January 11, 1952 (Record 99). The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 U. S. C. A. 1254(1)).

Questions Presented.

1. Whether the Circuit Court of Appeals in holding as a matter of law and contrary to the evidence there was neither common interest nor mutual advantage in the common use of the scaffold by respondent and petitioner's employer usurped the function of the jury of deciding the facts under the Seventh Amendment.

2. Whether the Circuit Court of Appeals in holding petitioner to be a licensee ignored or misconceived the applicable principles of law established by this Court, and by the overwhelming state authorities.

3. Whether the Circuit Court of Appeals misapplied the "mutual convenience" rule limiting it to the work to be done on the scaffold rather than to the use of the scaffold itself and thus deprived petitioner of a jury trial on the facts under proper rules of law.

Statement of the Case.

Petitioner, John H. Arthur, an employee of H. B. Foley Company, electrical subcontractor of the Chas. Tompkins Company, contractor for the construction of the West Central Heating Plant in the District of Columbia, brought an action for damages for personal injuries against respondent, Standard Engineering Company, the steamfitting subcontractor on the project. Petitioner was injured when a scaffold on which he was working broke, causing him to fall some fifteen feet to the ground sustaining serious and permanent injuries.

The steamfitting subcontractor (respondent) constructed a scaffold in accomplishing its part of the work. Parallel with and about four feet from a large pipe already installed, the steamfitters placed a long plank, each end of which rested on a rigid support. Two shorter planks were put in a transverse position to span the four-foot space between the long plank and the pipe with which it was parallel. A sheet of plywood, four by six feet, on the two transverse boards served as a platform for the workmen. A custom and usage existed in the District of Columbia at the time in question for employees of a subcontractor to use scaffolds erected or maintained by other subcontractors (R. 16, 24, 27, 28, 43, 44, 46, 47, 56, 63, 67) which was followed at this particular project (R. 17, 44, 57).

In like manner, the different crafts customarily make common use of ladders and similar equipment. On the project involved here, the steamfitters had used ladders owned by the electricians. That custom developed as a matter of necessity since employees of one craft perform work simultaneously with those of other crafts or immediately follow them during the course of the construction work (R. 16, 24, 29). The practice is not to remove the scaffolds of another but for employees of a subcontractor to use scaffolds which have been erected and are available when such employees are working in the area (R. 43). The scaffolds generally are erected at a particular part of the building by the craft first working at that place (R. 16). The scaffold on which petitioner had been working, which broke, was erected and furnished by respondent (R. 18). Respondent's foreman invited petitioner to use the scaffold and knew petitioner was using it (R. 15, 55, 60). Moreover, respondent's employees, because of the common interest in and mutual advantage derived from such practice, used extension ladders and stepladders which had been erected and set up by petitioner's employer, the electrical subcontractor, H. B. Foley Company (R. 29, 57, 60).

The steamfitters had installed the pipes in the area where the scaffold had been erected by them, using the scaffold in so doing (R. 55). However, it was necessary for the steam lines to be tested later and the scaffold was left there for such purpose when needed. During part of the time while petitioner and his fellow employees were using the scaffold, respondent's employees were likewise using the same scaffold (R. 55, 60). To avoid the additional time and expense of removing it and because it would later be used again by the steamfitters, respondent, through its representatives, entered into an arrangement with the electrical subcontractor to use the scaffold.

If petitioner and his fellow employees had not been able to use the scaffold of the steamfitters, then the latter would have been required to remove their scaffold in order that the electrical subcontractor could erect its own scaffold in the same place; whereupon the steamfitters would then have later been required either to use that scaffold or erect another of their own after the electrical subcontractors had finished with their work (R. 14, 16, 17, 28, 43). There was reciprocal use of each other's equipment because of the common interest and mutual advantage in performing their respective work at the same time and in the same general area.

In addition, under the arrangement, the electrical subcontractor was to remove another scaffold which had been erected by the steamfitters as a part of the general exchange and mutual benefit, thus saving the latter from the expense of so doing (R. 44).

The employees of the electrical subcontractor and those of respondent were using the scaffold in question during the same period and at times simultaneously (R. 52, 55, 56, 60). As their work was going on in the same area of the building at the same time, it was necessary that the workmen of each intermittently use the scaffold in order that the construction work could progress (R. 11, 14, 26).

The span of the board used as part of the construction of the scaffold was unsafe for use according to the testimony of an inspector of the District of Columbia Industrial

Safety Board (R. 39). Certain safety standards in the District of Columbia pertaining to the erection or maintenance of scaffolds were offered in evidence by petitioner (R.70) but were ruled inadmissible by the trial court. The Circuit Court of Appeals did not pass upon the question whether such regulations were properly excluded although that was one of the questions presented by the appeal.

The trial court at the close of petitioner's case directed a verdict for respondent holding as a matter of law, that petitioner was merely a licensee of respondent in regard to his use of the scaffold and that respondent had no duty toward him except to refrain from wilful and wanton injury (R. 75).

The Circuit Court of Appeals affirmed the judgment (R. 85-88).

Petition for Rehearing was duly filed (R. 91) which was denied January 11, 1952 (R. 99).

Reasons for Granting the Writ.

I.

This Court in *Bennett* v. *Louisville & Nashville Railroad Company,* 102 U. S. 577, 26 L. ed. 235, quoting Campbell on Negligence in distinguishing between invitation and license said the principle appears to be that invitation is inferred when there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it. Both the trial court and the Circuit Court of Appeals substituted their view of the evidence for that of the jury and held as a matter of law that the petitioner was a licensee instead of an invitee, although from the evidence the jury could have easily found not only common interest but also mutual advantage on the part of respondent and petitioner's employer in using each other's equipment including the scaffold in question.

Neither of the courts below could as a matter of law hold that the jury could not have found either common interest

or mutual advantage except by usurping the function of the jury in determining matters of fact. *Ellis* v. *Union Pacific Railroad Co.*, 329 U. S. 649, 91 L. ed. 572, 67 S. Ct. 598; *Bailey* v. *Central Vermont Railroad*, 319 U. S. 350, 353, 87 L. ed. 1447. As a minimum, fair minded men might differ as to whether under the circumstances of this case, the jury would be warranted in finding common interest or mutual advantage in the use of the scaffold and the case should have gone to the jury under appropriate instructions, defining, respectively, the status of an invitee and a licensee. *Gunning* v. *Cooley*, 281 U. S. 94, 74 L. ed. 724, 50 S. Ct. 231. Indeed the Circuit Court of Appeals seems to admit this on page 4 of the opinion (R. 89); however, it not only misconceived the applicable principles laid down by this Court in the *Bennett* case, *supra*, but also misapplied its own rule.

The cardinal misconception of the court below was that the invitation had to extend to the work done on the scaffold rather than to the common use of the scaffold, thereby enabling respondent and petitioner's employer in their common interest and to their mutual advantage to work economically and simultaneously in the same area.

Moreover, the lower court ignored a portion of the rule in the *Bennett* case which held that invitation was inferred where there was either a common interest or a mutual advantage, and limited its application purely to mutual advantage or mutual benefit.

Clearly the invitation extended to the use of the scaffold and the common interest was not only in promoting the efficient and orderly progress of the construction but also in advancing the work of respondent and petitioner's employer. It was to their common interest to avoid friction and a race to preempt the area in which their work was conjoined.[1]

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[1] To avoid repetition attention is respectfully invited to the petition for rehearing (R. 91-98), which elaborates both common interest and mutual benefit from the use of the scaffold.

Such were the reasons which impelled the steamfitters and the electricians to use each other's equipment and the reciprocal invitations to that use were plainly, as appears from the evidence, for their own admitted mutual advantage.

It is respectfully submitted the Seventh Amendment does not permit a court in the face of positive testimony tending to show a legal relationship which would admittedly permit a recovery, to hold as a matter of law there was no such relationship. It was for the jury to say, not the court, whether the facts adduced in this case constituted common interest or mutual advantage, under proper instructions. In so holding both the trial court and the Circuit Court of Appeals deprived the petitioner of his right to a jury trial under the Seventh Amendment. *Bailey* v. *Central Vermont Railroad, supra.*

In selecting the case of *Brauner* v. *Leutz,* 293 Ky. 406, 169 S. W. 2d 4, upon which to bottom its holding, the Circuit Court of Appeals not only misconstrued the opinion in that case but also misapplied it in the instant case. Rightly read, the *Brauner* case is in harmony with those of other jurisdictions, hereinafter mentioned, and is in favor of the petitioner.[2]

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[2] The facts are far different in the *Brauner* case from those here. There the painter and the carpenter had independent contracts with the owner in which there was no common interest in performance, whereas here respondent was a subcontractor and petitioner's employer was likewise a subcontractor having equal status in the closely related performance of their work. *Larson* v. *Tri-City Service Co.,* 132 F. 2d 693, *infra.* There was no invitation express or implied by the carpenters to the painter to use their scaffold and no contention by the plaintiff there was such invitation, whereas here, there is an express invitation by the steamfitters for the electricians to use their scaffold, and there was reciprocal use of equipment. No benefit in the *Brauner* case flowed to the carpenters from the use of the scaffold by the painter whereas here, as has been seen, there were both common interest and mutual advantage in the common use of the scaffold and other equipment to avoid interference and friction, save expense, and efficiently perform their respective work in the same place at the same time. There was

The precise situation as appears in the instant case was before the court in *McGlone* v. *Angus, Inc.*, 248 N. Y. 197, 161 N. E. 469. There an employee of a subcontractor sued another for injuries caused by defective scaffold erected by ~~such~~ subcontractor. In a unanimous decision of one of the greatest courts in that State, it was said:

> Negligence is gauged by the ability to anticipate. The Angus Co. apparently knew that its men were not the only ones at work upon the building. As the iron work went up, the stone work soon followed. Both classes of employees were working together. When the Angus Co. placed boards over the iron beams forming a scaffold or flooring for its derricks, could it reasonably anticipate that other workmen on the structure would walk over the flooring? On the evidence this was a question for the jury . . . .
>
> Under these circumstances and conditions, if reasonable care would have anticipated such use then it was the duty of the defendant to erect its platform or flooring with due regard of the user by others. That is it was under the duty to use reasonable care to construct it safely for those whom it had reason to anticipate would naturally and customarily use it in the course of the work.

The Circuit Court of Appeals (R. ~~88~~ 87) assumed the opinion in the *McGlone* case did not take into consideration the question of the legal status of the subcontractor's injured workman. How this could be said is not able to be perceived because it seems implicit from the standard of care set by the court that such was bound to have been consid-

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no interference or no friction between the carpenters and the painter in the *Brauner* case as the latter could have done his work on the outside at any time after the carpenters were finished. Indeed, he had his own equipment on the ground, ready to put up, but sought license or permission to use the carpenters' scaffold. In short, there was neither common interest nor mutual benefit in the case, but the court plainly indicated in its opinion, if there were mutual advantage in the use of the equipment, the painter would have been an invitee.

ered. The *McGlone* case is a landmark in establishing the true principles which should govern such cases, and plainly held under evidence far less clear, strong and convincing as that in this record, that the case was one for the jury.[3]

In *Larson* v. *Tri-City Electric Service Co.*, 7 Cir., 132 F. 2d 693, in which again the facts were almost precisely similar to the instant case, the court said:

> We think the relationship of plaintiff and defendant was not such that defendant owed plaintiff a duty merely not to wantonly or wilfully injure plaintiff. Plaintiff and its employees and defendant and its employees were each occupants or tenants of the plant for purpose of performing their respective subcontract. Neither had any right to possession other than as such subcontractor. Each was present at the invitation of the owner, and the general contractor; each of them was granted use of the plant and its equipment for the purpose of and to the extent necessary in performing its respective legitimate obligation. Neither had any authority over the other or over its employees; each of them was a co-tenant with equal rights and equal privileges and consequently must be held to the duty of co-tenants in use of common property or of fellow-travelers of the highway, each of whom is rightfully in the place occupied—a duty to exer-

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[3] In *Duggan* v. *National Constructors & Engineers*, 228 N. Y. S. 126, 129, 223 App. Div. 163, the Court said:

> The defendant Masten Company owed a duty to all the employees, whether its own or others rightfully on the premises, who used the ladder to the knowledge of the defendant, or its superintendent in charge with its implied consent. An obligation under the circumstances here disclosed arises in an owner or contractor who erects a ladder to anticipate that it will be used by persons engaged in occupations in the construction of the structure, but not in its employ. Where the nature of the construction and the commingling of the employees in a common object at the time of the erection of a ladder requires it, a person who constructs a scaffold or erects a ladder to be used in the performance of labor in the erection of a building has a duty incapable of delegation.

See also *Bisson* v. *John B. Kelly*, 314 Pa. 99, 170 Atl. 139.

> cise reasonable care for safety of the co-tenants or the fellow-travelers.
>
> Defendant contends that plaintiff was a licensee of defendant. This conclusion we think is supported by no premises in evidence. A licensee imputes permission or authority from one occupying a superior position. . . . But where as here, plaintiff and defendant are equal in their rights and each is a person invited on the premises by a third person who occupies a position of superior authority, there arises no basis for limitation of liability of defendant on the ground that plaintiff is defendant's licensee . . . (citing cases) . . . Plaintiff and defendant being on equal footing, the trial court rightfully held that each owed to the other the duty to exercise the ordinary care of a reasonable prudent man for the safety of the other.

Pettyjohn & Sons v. *Basham,* 126 Va. 72, 100 S. E. 813, 38 A. L. R. 391, 395, correctly read, is also in favor of petitioner's position. See particularly the language of the court:

> "* * * but if he was an invitee, and the invitation extends to that use of the scaffold, then Pettyjohn & Sons are liable to him for the injuries sustained in consequence of his fall."

Thus the well considered and leading cases clearly and unequivocally recognize the common interest and mutual advantage or benefit in the reciprocal use of equipment including scaffolds by the building trades during the course of construction to enable them to perform their respective work simultaneously in the same areas. To hold as a matter of law that one subcontractor, together with its employees occupies a superior position with respect to another and its employees, contrary to the facts in evidence, when both subcontractors are equal in their rights to perform their work on the premises, is to deprive petitioner of his Constitutional right to a jury trial.

Both the courts below misapplied the principle laid down by this Court in *Bennett* v. *Louisville & Nashville Railroad Company, supra,* and the petition should be granted for

this reason. *Johnson* v. *United States,* 333 U. S. 46, 92 L. ed. 468, 68 S. Ct. 391.

In *Maggio v. Zeitz,* 333 U. S. 56, 77, 92 L. ed. 476, 68 S. Ct. 401, the Court said:

> When such a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for further proceedings consistent with the principles laid down in this Court's opinion.

Moreover, "Where the conclusion is a 'composite of fact and law,' * * * this Court may certainly hold that as a matter of law the findings are erroneous." *United States* v. *John J. Felin & Company,* 334 U. S. 624, 639, 92 L. ed. 1614, 68 S. Ct. 1238.

This case is of great importance to the various crafts in the building trade industry. Especially is this so when the vast amount of construction work going on in the United States is envisaged, of which this Court will certainly take judicial notice. The petitioner who sustained severe and permanent injuries, has been deprived of his right to have a jury verdict on the facts, under instructions defining the correct and applicable legal principles.

The approach of the Circuit Court of Appeals to the problem not only discourages cooperative effort in the common interest among the various trades in the building industry, but also places a premium on careless disregard of ordinary safety precautions pertaining to equipment and its use in the important construction field.

Conclusion.

It is respectfully submitted petitioner has been deprived of his right to have a jury decide the facts under appropriate instructions from the court; that both courts below misconceived and misapplied the applicable rule laid down by this Court; and adjudicated the rights of petitioner without considering the essential facts in the light of the controlling law, and that the petition should be granted.

Respectfully submitted,

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FILED
MAY 23 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

No. 698

JOHN H. ARTHUR, *Petitioner*

v.

STANDARD ENGINEERING COMPANY

SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully invites the attention of the Court to the well-considered case of *Meny* v. *Carlson,* 6 N. J. 82, 77 A. 2d 245, 22 ALR 2d 1160, which is strikingly similar to the instant case.

There Meny, an employee of a subcontractor, sued another subcontractor, Busman and Rosen, Inc. and the Carlson Company, general contractor, for damages for personal injuries resulting from a fall by the plaintiff from a scaffold. The employee recovered against both and they appealed. Questions of negligence in erecting and maintaining the scaffold; whether it was furnished to the plaintiff; and whether the status of the plaintiff as licensee or invitee was a matter for the court alone or was a jury question, were all directly involved. The court said, dealing with the contentions of the subcontractor:

> "This defendant first contends that judgment should have been entered on its behalf because the evidence established that the plaintiff was a licensee on the scaffold and the only duty owed by this defendant was to refrain from willful or wanton injury. This conclusion

would be proper if the premise were correct. To establish the propriety of the premise resort must be had to the evidence. It is conceded that the scaffold was erected by this defendant and that this defendant knew the plaintiff would use the scaffold. The contract between this defendant and the Carlson Company provided, inter alia, that the scaffolding erected by this defendant was not to be removed without consent of the Carlson Company. An inference is thus created that this defendant contemplated the use of the scaffold by the plaintiff. There was testimony that in construction work, of the nature here involved, cooperation among the various trades is customary. In support of such a prevailing custom, the evidence discloses that certain cleat boards were nailed to wooden beams on the roof by the carpenters, employees of this defendant, and were left there by the carpenters, upon completion of their work, for use by the roofers, of which the plaintiff was one, in the performance of their work. It is observed that the scaffolding was erected on the side of the building and provided a means for the plaintiff to reach the roof and make use of the cleat boards which were left there by the carpenters for the plaintiff's use and benefit. These facts are suggestive of an implied invitation by this defendant for the plaintiff to use the scaffolding as a necessary incident to the performance of his work. This is particularly true since it would be unrealistic in a project of this nature, where the work of the mechanics is overlapping, for each subcontractor to erect scaffolding solely for his own use so that several sets of scaffolding would be required to be erected for work on the same building. Moreover, there was evidence from which the jury could determine that an express invitation had been extended by this defendant, through its foreman, James Hazekamp, to the plaintiff to use the scaffold. An express invitation was testified to on behalf of the plaintiff. It is urged by this defendant that its foreman, Hazekamp, had no authority to permit employees of other contractors to use the scaffold and that he, in fact, did not authorize the plaintiff to use the scaffold and whether Hazekamp had authority, either real or apparent, to bind his principal in this respect were questions properly submitted to the jury under the existing circumstances. There was testimony that Haze-

kamp knew that the plaintiff and the other roofers, as well as the tinsmiths, were using the scaffold; that Hazekamp was in charge of the carpenters; that his job was to see that the buildings were put up in a workmanlike manner and to govern the men under this defendant's contract; and that another part of the scaffold on the same building was still being used by the carpenters at the time the plaintiff was working on the part of the scaffold which collapsed. There was sufficient evidence to justify an inference that Hazekamp had control of the facilities used by the carpenters under his jurisdiction and apparent authority to authorize the use of such facilities by the plaintiff.

* * * * * * * * *

A review of the evidence convinces us that whether or not the plaintiff was an invitee of the defendant, Busman and Rosen, Inc.; and if an invitee, whether this status arose through an implied or an express invitation; whether this defendant placed Hazekamp in a position of apparent authority to extend an express invitation to use the scaffold; whether an express invitation was actually extended pursuant thereto; and whether the plaintiff was justified in relying thereon, were all questions properly submitted to the jury."

The court later on said:

"If the plaintiff was using the scaffold as an invitee of this defendant, and we have decided that the status of the plaintiff was properly for the determination of the jury, this defendant was under a duty to exercise due care for the safety of the plaintiff if, at the time of the occurrence of the accident, this defendant had the management of the scaffold under its control."

And in holding whether the subcontractor defendant had control of the scaffold was also a jury question, the court said:

"But mere use of the scaffold by the plaintiff would not as a matter of law divest this defendant of its control of the scaffold. Ownership of the scaffold, erection of the scaffold, and the properly inferable invitation by this defendant to the plaintiff to use the scaf-

fold created an inference from which the jury could justifiably determine that the scaffold was under the control of this defendant."

The court also held the general contractor liable and said:

"In the light of the surrounding testimony in this case that Busman and Rosen, Inc. were to erect scaffolding; that the carpenter work on the project was to precede the work of the roofers; that scaffolding was of necessity to be used by the carpenters, the roofers and the tinsmiths; that the work of the several subcontractors was somewhat overlapping; that cooperation among the workmen is customary on a project of this nature; and that the scaffolding erected by Busman and Rosen, Inc., was not to be removed without the consent of the Carlson Company, when considered with the fact that it would appear to be unrealistic for each of several subcontractors to erect its own scaffolding on a project such as this, sufficient evidence was presented for the jury to determine that the agreement between the parties was oral and that it included the obligation on the part of the Carlson Company to furnish necessary scaffolding for use by the plaintiff in the performance of his work."

Thus, that recent case recognizing the common interest and mutual advantage and benefit in the common use of equipment, including scaffolds, by the building trade during the course of construction, under facts remarkably similar to those in the instant case, plainly held it was for the jury to decide the facts under appropriate instructions from the court. The case still further emphasizes the unconstitutional action of the Appellate Court and the trial court below in usurping the function of the jury and denying the petitioner his right to have a jury verdict on the facts upon proper instructions from the court.

Respectfully submitted,

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